

affiliation with or sponsorship of ZonePerfect's products, and has engaged in other inequitable conduct for the same purpose. For example, its website refers to itself as the "Official Site of the Zone Diet." That in itself is a violation of the Lanham Act. See Nester's Map & Guide Corp. v. Hagstrom Map Co., 760 F. Supp 36, 37 (E.D.N.Y. 1991) (map maker who published the "Official New York Taxi Driver's Guide" found in violation of § 43(a)). The statement is further actionable because it is manifestly intended to convey, falsely, a continuing association with Dr. Sears, who created the Zone diet. ZonePerfect has also engaged in wholesale copyright infringement, running a series of articles that purport to explain the Zone diet but which in fact copy directly from Dr. Sears' books. See Tab J, a letter from Dr. Sears' counsel setting forth and extensively documenting the infringing activities. ZonePerfect has also attempted to associate itself with Dr. Sears by depicting Dr. Sears' books amid ZonePerfect's products, including its nutrition bars. That too constitutes a Lanham Act violation. See 4 McCarthy, § 27:74 at 38-39 (stating that "using a picture of plaintiff's product to advertise and solicit sales of defendant's product" has "developed into a distinct sub-category of cases well recognized as a § 43(a) violation" and citing many cases). Hence, even if the Court finds, as it should not, that the plaintiff would otherwise be entitled to a preliminary injunction, ZonePerfect's unclean hands and inequitable conduct bars it from the equitable relief it seeks.

CONCLUSION

For each of the foregoing reasons, this court should refuse to grant the plaintiff any of the injunctive relief it seeks.

BARRY D. SEARS
And ZONE LABS, INC.

By their attorneys,

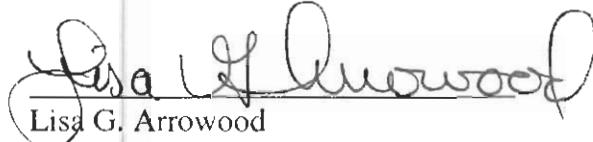


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CERTIFICATE OF SERVICE

I, Lisa G. Arrowood, hereby certify that a true and accurate copy of the foregoing document was served on all counsel of record via electronic mail and regular mail this 24th day of May, 2004.


Lisa G. Arrowood